6-30-2008

Order on Discovery Matters (AMANA I SA)

Alice D. Bonner
Superior Court of Fulton County

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AMANA I SA and
SHEIK MOHAMMED AL-AMOUDI

Plaintiff,

v.

CAIRNWOOD GROUP, LLC, CAIRNWOOD CAPITAL MANAGEMENT, LLC, LANE P. PENDLETON, LAIRD P. PENDLETON, KIRK P. PENDLETON, and THAYER B. PENDLETON.

Defendants,

Civil Action File No. 2006-CV-114931
(Business One—ADB)

ORDER ON DISCOVERY MATTERS

This case is before the Court on a continued discovery dispute involving Defendants' objections to the production of the emails of Tim Lundberg in native format.

Defendants responded to Plaintiffs' request to produce by copying the emails of Tim Lundberg into a word document and producing a redacted version of that word document. Defendants did not produce the actual emails (i.e., native format). Upon motion from Plaintiffs, on April 29, 2008, the Court ordered Defendants to produce the native format (original emails) of the Tim Lundberg emails. Defendants further objected to the production on the grounds that it would force them to produce irrelevant and privileged documents. After receiving several short letter briefs from counsel on this topic, in an Order dated May 29, 2008, the Court agreed to perform an *in camera* review of the documents in question. The Court ordered Defendants to produce for the Court the email communications of Tim Lundberg in native format and as produced to Plaintiffs. Shortly thereafter, Defendants delivered a redacted and unredacted version of the Tim Lundberg word document. Defendants did not provide the Court with the original emails.

Relevance

The scope of discovery is broad and a trial court has discretion in controlling discovery. Rice v. Cannon, 283 Ga. App. 438, 438 (2007). Given Mr. Lundberg's integral role in the management of several funds involved in this law suit, his business communications are relevant and discoverable. The Court hereby **DENIES** Defendants' relevance objections to producing the emails in native format.

Attorney-Client Privilege

The attorney-client privilege bars the discovery or testimony of confidential communications between a lawyer and his client. O.C.G.A. §§ 24-9-21, 24, 25, & 27; NationsBank, N.A., v. SouthTrust Bank of Ga., N.A., 226 Ga. App. 888, 896 (1997). The attorney-client privilege protects any communication made between the client and the attorney in confidence for the purposes of obtaining legal advice. See, Fisher v. U.S., 425 U.S. 391, 403 (1976); Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206 (2000); Griffin v. Williams, 179 Ga. 175 (1934); Marriott Corp., v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497 (1981). The party claiming the privilege bears the burden of establishing it. Zeilinski v. Clorox Co., 270 Ga. 38, 40 (1998).

The application of the attorney-client privilege is narrow and conservative. "Inasmuch as the exercise of the privilege results in the exclusion of evidence, a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is 'the object of all legal investigation.'" Tenet Healthcare Corp., 273 Ga. at 208; McKesson HBOC, Inc. v. Adler, 254 Ga. App. 500, 502-503 (2002) ("[T]he scope of the attorney-client privilege is far

narrower than that of the work-product doctrine, and it is far more readily waived by disclosure to a third party.").

The attorney-client privilege has been extended to corporate clients and the agents who act on the corporation's behalf. Marriott Corp., 157 Ga. App. at 503-505. To apply the attorney-client privilege to a corporate communication, the corporation must demonstrate that the communication was (1) made for legal advice, (2) done at the direction of the employee's corporate superior, (3) intended to secure legal advice, (4) addressed issues within the employee's corporate duties, and (5) not disseminated beyond those persons who had a need to know. Id. at 505.

Defendants' provision of the redacted and unredacted versions of the word document is of limited use for the Court's in camera review. Information such as to whom the email was sent, forwarded, or copied is missing, as is the date and time stamp. Additionally, each new email or reply is copied independent of its email "chain," thus the context of the communication is significantly obscured. For example, suppose Mr. Lundberg generated an email on Monday to a lawyer asking for advice; on Tuesday the lawyer provided advice and copied a third party on his reply; on Wednesday the third party responded directly to Mr. Lundberg with the earlier communications attached. That email chain would appear in the word document supplied by Defendants as an isolated communication from Mr. Lundberg on Monday, which might be subject to privilege; as an isolated email from an attorney on Tuesday, which also might be subject to attorney-client privilege; and as an isolated email from a third party. Forwarding an otherwise privileged communication to a third party breaks the privilege that would shield the Monday and

Tuesday communications from production. Without access to the entire email "chain" the Court has no basis upon which to evaluate the fifth prong under Marriot.

In addition, Defendants did not attempt to establish within the thousands of emails produced which of the non-parties were attorneys or other privileged persons from whom the legal advice was sought.[1] Accordingly, the Court finds that the Defendants failed to establish an appropriate basis for withholding documents and objecting to production based upon attorney-client privilege. Therefore, the Court hereby **DENIES** Defendants' objection to produce the Tim Lundberg documents in native format.

Defendants shall have ten (10) days from the date of this Order to assert a more specific claim of attorney-client privilege. Defendants shall have thirty (30) days from the date of this Order to produce the documents in their native format.

Fact discovery in this case is scheduled to conclude on July 31, 2008. This discovery issue, along with others, dictate that the deadline be moved to October 31, 2008.

SO ORDERED this 30th day of June, 2008.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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1. In addition, when the issue of native format production was first argued before this Court, Plaintiffs raised the issue that CGTF is now run by a liquidator who "has control over the corporation's attorney-client privilege with respect to pre-bankruptcy communications." See In re Maxim Group, Inc. Securities Litigation, 2002 WL 987660, *1 (N.D.Ga. 2002) (holding that a corporation's trustee is the only entity who has standing to assert privilege on behalf of the corporation). Thus, the scope of privilege able to be asserted by Mr. Lundberg is restricted to privilege he held at the time of the email communication and which he has not since waived.

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